

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0896**

*Affirmed*  
*Ineligible Weeks 33-20 through 20-21*

**PROCEDURAL HISTORY:** On July 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the weeks including August 9, 2020 through May 22, 2021 (weeks 33-20 through 20-21) and therefore was not eligible to receive unemployment insurance benefits during those weeks (decision # 130258). Claimant filed a timely request for hearing. On July 20, 2022, ALJ L. Lee conducted a hearing, and on July 29, 2022 issued Order No. 22-UI-199372, affirming decision # 130258. On August 17, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At hearing, the ALJ admitted Exhibit 1 into evidence, but did not mark the exhibit. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 1. Transcript at 65.

**FINDINGS OF FACT:** (1) On August 9, 2019, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. The Department determined that claimant had a monetarily-valid claim, and that her weekly benefit amount was \$307. Claimant also filed an initial claim for Pandemic Unemployment Assistance (PUA) benefits, but the Department determined that claimant was not eligible for PUA benefits because she was eligible for a regular UI claim.<sup>1</sup>

(2) Claimant claimed benefits for the weeks including August 9, 2020 through May 22, 2021 (weeks 33-20 through 20-21). These are the weeks at issue. The Department paid claimant benefits for weeks 34-20 through 38-20, 41-20 through 45-20, and 48-20. The Department did not pay claimant benefits for the remaining weeks at issue.

(3) The Department determined that claimant customarily performed janitorial work, and that her labor market for such work was Canby, Hubbard, Woodburn, Salem, Keizer, Wilsonville, and Tualatin,

<sup>1</sup> See generally 15 U.S.C. § 9021(a)(3)(A)(i). Note that while self-employed individuals who are not eligible for regular UI benefits may qualify for PUA benefits, claimant's eligibility for PUA is not at issue in this case, and EAB therefore lacks jurisdiction to address it.

Oregon. The Department also determined that janitorial work in claimant's labor market was customarily performed during all hours, every day of the week.

(4) In November 2019, claimant started a sole-proprietor business in which she subcontracted with general-maintenance companies to clean up biohazards (such as bodily fluids) at restaurants and other businesses. Claimant invested about \$10,000 in the business and had no employees. Claimant's work required her to be on-call and available 24 hours a day, seven days a week. Claimant lived in Canby, Oregon, but work calls could require her to travel as far south as southern Oregon, as far north as Battle Ground, Washington, and as far east as Bend, Oregon. Claimant earned approximately \$75 to \$150 per hour for the cleanup work she performed.

(5) Although claimant's business declined somewhat during the COVID-19 pandemic, claimant continued to perform the work through the weeks at issue. Claimant did not seek work with employers during the weeks at issue. During the weeks at issue, claimant was not willing to drop her self-employment work to work for an employer unless an employer would pay her the same rate that she had been making in her self-employment. During some of the weeks at issue, claimant reported weekly earnings as high as \$1,178 on her weekly claim; for other weeks at issue, she reported significantly lower earnings, or no earnings at all.<sup>2</sup>

**CONCLUSIONS AND REASONS:** Claimant was not available for work during the weeks at issue.

For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week \* \* \*.

\* \* \*

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<sup>2</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

OAR 471-030-0036(3) (December 8, 2019).<sup>3</sup>

Claimant claimed benefits for the weeks including August 9, 2020 through May 22, 2021. During that period, claimant was operating her biohazard cleanup business, which required her to be available 24 hours a day, seven days a week, to respond to work calls and, in some cases, drive significant distances. Claimant invested a significant amount of money in the business, and was paid as much as \$150 per hour for her work.

Working in self-employment does not constitute an automatic bar to being considered available for work under OAR 471-030-0036(3). However, in order to be considered available for work, an individual must, among other factors, not impose requirements which substantially reduce their opportunities to return to work at the earliest possible time. “Work,” in this context, refers to work for an employer in subject employment,<sup>4</sup> rather than performing services for one’s own business. The Department determined that claimant customarily performed janitorial work, and that such work in her labor market was performed during all hours of the day and all days of the week. Thus, for claimant to have been available for work during the weeks at issue, she must have been available to accept such work if it was offered to her. This presented a conflict for claimant, as her self-employment *also* required her to be available and on-call during all hours of the day and all days of the week. The record shows that claimant was unwilling to resolve such a conflict in favor of accepting employment.

At hearing, claimant stated that she only would have been willing to accept work with an employer during the weeks at issue if they would have offered her the same rate of pay as she had been making in self-employment, which was between \$75 and \$150 per hour. Transcript at 57. The record does not show what the prevailing rate of pay was for janitorial work in claimant’s labor market. However, the Department’s witness testified that the rate would have been less than claimant had been earning in self-employment. Transcript at 59, 61. Consequently, claimant was not willing to accept work in her labor market at the prevailing rate of pay for that labor market. As such, claimant’s requirement that an employer pay her at her self-employment rate constituted the imposition of requirements that substantially reduced her opportunities to return to work at the earliest possible time. Therefore, under OAR 471-030-0036(3)(c), claimant was not available for work during the weeks at issue.

**DECISION:** Order No. 22-UI-199372 is affirmed.

D. Hettle and A. Steger-Bentz;  
S. Serres, not participating.

**DATE of Service:** November 17, 2022

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem,

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<sup>3</sup> This version of OAR 471-030-0036 was in effect from December 8, 2019 through August 1, 2020 and December 27, 2020 through September 25, 2021. The rule was temporarily amended effective August 2, 2020 through December 26, 2020. However, the provisions of the rule relevant to this case are identical in both versions.

<sup>4</sup> *See generally* ORS 657.040.

Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](https://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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